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CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, PETITIONER

v.

WILLIAM P. MACCRACKEN, JR., RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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I

THE FACTS OF THE CASE

The material facts are concisely, but completely, stated in the opinion of the Court of Appeals, pages 109-114 of the record. The dissenting opinion states that "The essential facts to an understanding of the case are fully set out in the opinion." A perusal of the four pages on which the facts are "fully set out" will demonstrate that the statement in the petition of the "Question Presented" is *not* a statement of the question presented by *this* record.

II

THE APPLICABLE RULE OF THIS COURT

This Court's Rule 38, Paragraph 5(c), indicates that review on certiorari will be considered:

> "Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, . . . which has not been, but should be, settled by this court . . ."

III

PROPOSITION OF LAW ASSERTED BY PETITIONER

Petitioner's whole case is based upon the proposition baldly asserted, with black-faced emphasis, in his brief below, thus:

> **"There is no distinction in principle between the judicial and legislative power to summarily punish for contempt".**

That assertion petitioner now repeats here, minus the emphasis (p. 14).

Obviously the proposition thus asserted involves "a question of general importance". Equally obviously it is not a question "which has not been . . . settled by this Court". After fullest consideration and upon mature deliberation this Court has definitely settled that question contrary to petitioner's position. *Marshall* v. *Gordon,* 243 U.S. 521.

Petitioner's candor in asserting his position is as necessary as it is commendable. The essence of his entire case is the negation of the constitutional separation of the legislative and judicial functions. Petitioner naively supports his contention with the case that rejects it: *Marshall* v. *Gordon, supra.* There this Court, after pointing out that authority was possessed by the House of Commons in England to *punish* for contempt directly, that is, without the intervention of courts, which power indubitably, says the Court, rested upon an assumed blending of legislative and judicial authority possessed by Parliament, and adverting to the express grant to legislative bodies of power to *punish* for contempt contained in State constitutions, continued (l.c., p. 536):

> "No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, Sec. 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution."

Petitioner fortifies the "support" which he asserts is given his position by the case from which the foregoing is quoted by citing, to the point that "There is *no* distinction in principle between the judicial and legislative power to summarily punish for contempt", *Toledo Newspaper Company* v. *United States*, 247 U.S. 402, wherein the existence of such a distinction is expressly recognized (l.c. 416, 418):

> "In *Marshall* v. *Gordon*, 243 U.S. 521, the power of Congress to summarily punish for contempt came under consideration and it was there pointed out that the enlarged legislative power on that subject which prevailed in England prior to the separation, whether based upon the commingling of legislative and judicial authority or upon any other cause, was necessarily in this country greatly restricted and changed by the effect of the adoption of the Constitution and the operation of the division of powers and the guarantees and limitations which that instrument embodied. . . .

> "While the *Marshall Case* concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable, to the extent that they may not be inapposite *because of the distinction between legislative and judicial power.* Indeed the identity of the constitutional principles applicable to the two cases, *subject to the differences referred to was pointed out . . .*" (Italics ours).

With aptness, we believe, we may here adopt with respect to petitioner's position the language of the great Chief Justice in *Marshall* v. *Gordon* and say that "it would seem that the difference between the legislative and the judicial power was also sometimes forgotten" (243 U.S. at page 544).

IV

THE SOLE QUESTION PRESENTED UPON THE RECORD IN THIS CASE

This case involves as its sole question the right of the United States Senate to take a private citizen into custody with a view to punishing him directly and without recourse to the courts for the past commission of a completed act, which, prior to the proceedings to punish and the arrest of the citizen, had been undone so that it no longer did, or could, affect any proceeding of the Senate or any committee thereof.

That is precisely, and exclusively, what the case made by the record filed here with the petition involves, though it is not so stated by petitioner.

Manifestly, that required the Court of Appeals to decide "a question of substance relating to the construction or application of the Constitution". But again we respectfully but earnestly insist that that is not a question which has not been settled by this Court. Petitioner contends, as he must under *the undisputed record facts* of the case, that the Senate has power summarily to arrest a pri-

vate citizen and punish him by imprisonment for a past and completed act, deemed by it to have constituted an offense against its dignity, irrespective of the fact that there did not, and could not, in the circumstances, exist any necessity for repression to prevent immediate recurrence of the act complained of, that is to say, the continued existence of any interference or obstruction to the exercise of the legislative power. In other words, this Court is asked to review a decision which does no more than hold that the implied power of each House of Congress to deal with contempt does not embrace punishment for contempt as punishment. Certainly this is a question which has been clearly and definitely "settled" by this Court. In *Marshall* v. *Gordon*, 243 U.S. 521, at page 542, this Court said:

> "Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power *it is clear that it does not embrace punishment for contempt as punishment*, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." (Italics ours).

After then pointing out that the essential nature of the power makes it clear that, even when applied to subjects which justify its exercise, it is limited to imprisonment which may not be extended beyond the session of the body in which the contempt occurred, this Court held that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the legislative body to deal with directly under its implied power to preserve its functions, that authority does not cease to exist because the act complained of had been committed when the authority was exerted, but with great clarity the Court pointed out the class of cases to which

alone the authority extended after the act complained of had been committed. This we submit, despite petitioner's reliance upon this part of the Court's opinion, is too clear for argument when there is considered the exact language of the opinion (p. 545):

> ". . . when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act *there is necessity for repression to prevent immediate recurrence,* that is to say, *the continued existence of the interference or obstruction to the exercise of the legislative power.* And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

By no stretch of the imagination could it be said that the act for which the Senate in this case asserted the right to inflict punishment for contempt as punishment was of a nature and character to admit of the claim that there was necessity for represion to prevent immediate recurrence, or that by any possibility there could have been an immediate, or any, recurrence, or that it was necessary for the Senate, at the time of the arrest of the respondent, to do anything to prevent "the continued existence of the interference or obstruction to the exercise of the legislative power", or that there was then any interference or obstruction. Indeed it is fair to say that no claim has ever been made in this case, either before the Senate or the Courts below, that the arrest of the petitioner was for the purpose of taking any action to prevent immediate recurrence of the act complained of or the continued existence of any interference or any obstruction to the exercise of legislative power. There was no threat of any recurrence,

immediate or otherwise, and there was not in existence any act either interfering or threatening to interfere with or obstruct the exercise of legislative power. We repeat, no such claim has ever been made in this case. It is the contention of the petitioner, as it was the assertion of the Senate, that, utterly irrespective of any "necessity for repression to prevent immediate recurrence" of an act of the petitioner which had occurred ten days before the Senate warrant under which he was arrested was issued—and which had been undone, and the effects of which had been removed six days before the issuance of that warrant—the Senate's power does "embrace punishment for contempt as punishment". In other words, it is flatly asserted that the power embraces that which this Court has flatly held it does *not* embrace (243 U.S. at page 542).

In this case the warrant was not issued for the purpose of exercising any authority to prevent acts which obstructed or prevented the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. The warrant and the proceedings which led up to it and which followed its issuance did not have for their purpose the preventing of any act or the compelling of any act. There was no pretense of exerting a coercive authority. There was a claim to an unreviewable right to exert punitive authority.

Hence, the Court of Appeals had before it nothing that had "not been settled by this Court" and its decision merely gave "proper effect to an applicable decision of this Court".

V

THERE ARE STATUTORY PROVISIONS, AND LEGISLATIVE POWER TO PROVIDE, FOR PUNISHMENT OF CONTEMPTS OF CONGRESS "UNDER THE CRIMINAL LAWS IN THE AMPLEST DEGREE".

Confusion results from reiteration of the idea that unless the Senate had the power it asserted in this case, then

the deliberate refusal of a witness to testify before a congressional investigating committee, when lawfully required so to do, or the wanton destruction by a witness of documents which he has been lawfully subpoenaed to produce before such a committee, would go unpunished. Nothing could be more erroneous than this. To compel a witness to answer a pertinent question propounded to him by any congressional committee, or propounded to him in a proper proceeding at the bar of either House of Congress, there is authority *in the legislative body* to imprison him until he does answer. To compel the production of a document lawfully called for, there is the same authority. There is more than that. There is authority under the general criminal law to punish by fine and imprisonment the refusal to testify or to produce documents (Secs. 102-104, R.S.U.S.; Act of January 24, 1857, 11 Stat. 155, c. 19). This of course covers any case of the destruction of such documents whereby their lawfully called-for production is thwarted. *The power to punish* for refusal to testify or produce, under the general criminal law, after trial before a judicial body, *does not end* when the offending witness recants and testifies or produces. *But the power of the legislative body to deal with the contempt*, which power rests in that body only *for the purpose of compelling* the doing of that which it has a right to have done, *does so end.* Except in isolated cases where for the moment the purpose and the extent of the legislative power to deal with contempts were obviously overlooked, this has consistently been recognized:

> "Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the im-

> plied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration." (243 U. S. 544.)

And with respect to the exceptions thus adverted to, the Court said:

> "In the two or three instances . . . we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten . . ." (243 U. S. 543.)

We shall not here go into a discussion of the facts upon which was based the charge that respondent had committed an act of contempt. Hereinafter, to the extent that statements contained in the petition seem to require it, we shall briefly advert to the facts of this case, none of which was disputed, all of which were conceded. We have denied and we again earnestly deny the commission of any act justifying such a charge or any act justifying criticism of or reflection upon respondent's conduct. For present purposes it is sufficient, though hardly needful, to point out that if there was justification for the charge the law provided for its prosecution and the Constitution and applicable statutes provided the tribunals where alone the charge could be made and the respondent tried. That tribunal is judicial and not legislative. Otherwise it would be manifest that—

> "those things which, as pointed out in *In re Chapman, supra,* were distinct and did not therefore the one frustrate the other—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other." (243 U. S. 547.)

The Congress has enacted, and there is in existence, statutory law covering *punishment* for contempts consisting of refusal to testify or to produce documents subpoenaed. R.S.U.S., Sec. 102. This was within the legislative power of Congress. The Congress has plenary legislative power to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act:

> "We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends." (243 U. S. at 548.)

VI

COMPARISON OF CONCEDED FACTS WITH PETITIONER'S STATEMENT OF QUESTION PRESENTED

The facts were not disputed, yet they are quite different from what the petition here, at least inferentially, represents them to be. Respondent neither secreted nor destroyed, nor permitted to be secreted or destroyed, any documents called for by the subpoena of the Senate Committee. He neither "wilfully", nor otherwise, did or per-

mitted any such thing to be done. Nor did he at any time refuse to testify. And, we repeat, this is not the subject of question or dispute. Concededly respondent immediately the subpoena was served upon him produced every document embraced within its comprehensive terms, except only communications between himself and his clients, relating to the subjects in respect of which he was retained as attorney, which he conceived to be privileged. Concededly respondent promptly—the very day the subpoena was served—compliant to the Committee's request, telegraphed his clients for instructions as to whether or not they waived the privilege. Concededly every one of his clients did waive, and every document, whether privileged or not, was produced instantly waivers were received. Concededly, before the warrant involved in the instant case was issued, every document covered by the subpoena had been produced and was in the actual possession of the Senate Committee. (R. 11) Finally—concededly—the only papers subpoenaed which were ever out of respondent's possession, after service of the subpoena, were those which he permitted the client, whose papers they were, to have for examination, and these the client had promptly returned and they had been produced and delivered to the Senate Committee six days before the issuance of the warrant. (R. 8-9) It will, of course, be remembered that as to the "Brittin incident" it is conceded (a) that respondent had no connection with or knowledge of it, and (b) that the papers there involved were not covered by the subpoena. (R. 6-7; 57-67; opinion, R. 112; 117)

Since petitioner here demurred to respondent's petition for habeas corpus, thereby admitting the truth of the material facts there stated, it is, in the light of those indisputable facts, somewhat difficult to understand the present petition's statement of the question presented. Hence we have herein undertaken to state the real, and only, question which this record presented to the United States Court of Appeals for this District.

VII

CONCLUSION

The questions of general importance and of substance relating to the construction or application of the Constitution involved in this case have heretofore been settled by this Court. The Court of Appeals plainly gave proper effect to the applicable decisions of this Court. We recognize the importance and delicacy of any case calling into question an asserted power of a coordinate department of the Government—or even, as here, of one branch of such department. After all, that consideration would seem to be the only real reason here relied upon by petitioner. But it has never yet been thought that the fact that the issuance of the writ of certiorari was prayed by the Government, or any of its departments, in and of itself called for the granting thereof. And that it should not be now so considered is—

Respectfully submitted,

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Washington, D. C.,
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